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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 642 - 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

GERALD THOMAS,

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, BRIEF IN SUPPORT THEREOF AND MOTION.

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(2) The involved matters and things are of momentous public concern..... 18

(3) In the instant case (Opinion, R. 68-71) and In re 4145 Broadway Hotel Company, 100 Fed. 2nd, 7, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, In re 4145 Broadway Hotel Company, 117 Fed. 2nd, 639, the same court holds and In re 4145 Broadway Hotel Company, 124 Fed. 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the same matter and between the same parties is within the letter and spirit of the first clause of Rule 38, 5 (b) 19

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision 20

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. Case et al., v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 109..... 20

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction in bankruptcy after confirmation and consummation of the plan of reorganization. The interpretation in these respects of the federal statutes presents important questions of federal law which have not been, but should be, settled by this Honorable Court 20

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Respondents

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

Circuit Court of Appeals cases numbers 7888 and 7891 are both appeals from the one order of the District Court committing your petitioner to jail for contempt of court

(R. 46), the appeal in case number 7888 perfected in accordance with the Rules of Criminal Procedure (R. 27-31) and in case number 7891 in accordance with the rules of Civil Procedure (R. 47-49).

The District Court's order was not entered at the instance of the United States but upon petition of respondents Rossetter, McCord and Rosenthal, and neither the Attorney General nor anyone else representing the United States has ever appeared either as petitioner or moving party in the District Court or as appellee in the Circuit Court of Appeals. Accordingly, when we speak in this petition and in the supporting brief of "respondents" we refer to the respondents in case No. 7891.

By orders of January 15, 1942 (R. 65), the Circuit Court of Appeals consolidated cases Nos. 7888 and 7891 for hearing, directed that the records therein and in three related prior appeals by your petitioner (CCA Case Nos. 6696 and 6733, consolidated, *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd 7; CCA Case No. 7497, *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, cert. den'd. 313 U. S. 593; CCA Case No. 7763, *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821) stand as of record in both CCA case No. 7888 and CCA case No. 7891, and that in the latter two cases your petitioner be required to print only such parts of the records in the three related prior appeals as were not already printed in one or the other of the same. Accordingly, in the instant case (CCA Cases Nos. 7888 and 7891, consolidated) the only printed transcript of record is a single Transcript of Record of the records peculiar to Circuit Court of Appeals Cases Nos. 7888 and 7891. In the Circuit Court of Appeals this Transcript and the Transcripts of Record in the three prior appeals were

cited herein by all counsel as, respectively, "R. .....", "Trans. 6696, p. .....", "Trans. 7497, p. ....." and "Trans. 7763, p. .....". Very few copies of any of the three printed Transcripts of Record in the prior related appeals are now available.—Your Honors' grace if we seem to presume to anticipate favorable disposition of your petitioner's motion herewith (*post*), but, as it were of near necessity, counsel for petitioner similarly cites the above mentioned Transcripts of Record in this petition and in petitioner's supporting brief.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Your petitioner, F. Gerald Thomas seeks review and reversal of identical orders (R. 72-73) of the United States Circuit Court of Appeals for the Seventh Circuit entered July 18, 1942, rehearings denied December 4, 1942 (R. 105), in CCA Cases Nos. 7888 and 7891, consolidated, affirming an order of the District Court for the Northern District of Illinois, Eastern Division, entered December 1, 1941 (R. 46). The District Court's order sustained charges by respondents Rossetter, McCord and Rosenthal, "stock trustees," that **in 1941** your petitioner violated a temporary injunction order of the District Court entered May 26, 1938 (R. 52; Trans. 7497, p. 10), and therefore committed petitioner to the County Jail of Cook County, Illinois, for 90 days, for contempt of court.

4145 Broadway Hotel Company is a reorganized Illinois debtor corporation, the bankruptcy proceedings instituted Aug. 10, 1934 (R. 32). Plan of reorganization was confirmed March 7, 1935 (Trans. 7497, pp. 2-8). May 10, 1935, a reorganization Trust Agreement of May 1,

1935 (Trans. 7497, pp. 142-147), and the form of trust certificates thereunder were approved by the District Court and distribution according to the plan of reorganization ordered (Trans. 7497, p. 8). July 26, 1935, the receiver's final report was approved, his and his attorney's fees fixed and paid (R. 34) and the application for fees to be allowed other persons continued to September 16, 1935 (R. 34),—finally fixed November 18, 1935 (R. 34). Meanwhile, on July 29, 1935, respondents Rossetter and McCord and one Paul Steinbrecher (since deceased, and succeeded by respondent Rosenthal) took possession of the reorganized debtor corporation's property (Trans. 6696, p. 6, 9th line).

From November, 1935, when the last fees were fixed, to January 18, 1938 (See, Trans. 6696, p. 5, 8th line from bot.), there were no proceedings whatever in the bankruptcy case. But following your petitioner moving, January 24, 1938 (R. 34) for leave to intervene, on May 14, 1938 (R. 35), entry of final decree was set for June 15, 1938, and followed by orders of continuance of entry of final decree, the last of which (September 30, 1938, R. 36) continued the same generally.

To date the final decree in the bankruptcy case proper has not been entered.

In its order of March 7, 1935, confirming the plan of reorganization the District Court in terms, but your petitioner insists inconsistently with the plan of reorganization and the relevant provisions of the Bankruptcy Act, reserved a supervisory jurisdiction over the reorganization trustees, they to make annual reports to the District Court for the presumable ten-year life of the reorganization trust (Trans. 7497, p. 7, par. 17 and p. 8, par. 21).

April 15, 1938, your petitioner entered the third of three motions by your petitioner in the District Court for leave to file, this third time your petitioner's so-called second amended petition (R. 35). This proposed second amended petition was never reduced to record but the record otherwise shows its general nature (R. 35 and Trans. 6696, p. 3, 3rd par. and pp. 5-8), namely, that it sought to invoke the supposed powers of the District Court over the reorganization trustees by reason of the attempted reservations of jurisdiction in the order of March 7, 1935, confirming the plan of reorganization. May 23, 1938, the District Court denied petitioner leave to file this proposed second amended petition, on the ground, among others, that "the allegations in the second amended petition are not relevant to the acts and doings of the Trustees over whom [which] the court has retained jurisdiction" (R. 7-8, 2nd par.).

Meanwhile, on May 1, 1938, respondents Rossetter, McCord and Rosenthal filed a sworn petition (Trans. 6696, pp. 2-8) alleging that during the pendency of petitioner's motion of April 15, 1938, your petitioner mailed to stockholders a letter of April 27, 1938, copy attached to respondents' petition (Trans. 6696, pp. 5-8), and in that letter made charges against respondents **"similar to those contained in the second amended petition"** (Trans. 6696, p. 3, 3rd Par.), **the subject matter of the letter the same as petitioner's pending motion,** and that the mailing of the letter was "an affront and an insult to the court **while said litigation is pending and undisposed of";** and praying an order restraining petitioner until further order of the court from sending out any further communications or soliciting or accepting any powers of attorney from stockholders, and a rule on petitioner to show cause why he should not be held in contempt of

court for sending out the letter of April 27, 1938 (Trans. 6696, p. 4). May 5, 1938, a restraining order as so prayed by respondents was entered on the face **(no proofs taken)** of respondents' petition, your petitioner ordered to show cause within ten days why he should not be attached for contempt of court and the matter set for hearing May 23, 1938 (Trans. 6696, pp. 14-15). May 16, 1938 (Trans. 6696, pp. 8-13), your petitioner answered the rule under oath and denied substantially every allegation of respondents' petition except that he admitted the sending out of his letter of April 27, 1938 (Exhibit A, to respondents' petition, Trans. 6696, pp. 5-7).

May 23, 1938, **no evidence offered or received,** petitioner's motion for leave to file his proposed second amended petition was heard and denied (Trans. 6696, p. 57).

The above mentioned proceedings on May 23, 1938, are discussed and in part set out in the opinion, text and footnotes, of the Circuit Court of Appeals in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7. In view, however, of the vital importance of these proceedings of May 23, 1938 (Trans. 6696, pp. 62-67), and of petitioner's inability to furnish at this time multiple copies of the transcript in case No. 6696 (see petitioner's motion herewith, *post*), we print these proceedings in full under this same cover, page for page to preserve the page numbers of the same in Transcript 6696.

On May 23, 1938, the court, having denied or announced its decision to deny petitioner leave to intervene, stated that unless petitioner **was willing** to be enjoined from sending out communications to stockholders and from using his powers of attorney **pending appeal by petitioner from the order of May 23, 1938,** the court would attach

petitioner for contempt for sending out petitioner's letter of April 27, 1938. Petitioner inquiring whether petitioner could not appeal from such an injunction, **the court said that if the injunction could not be a consent order** the court would proceed with the contempt matter. On these premises petitioner did consent **to be so enjoined pending possible appeal from the order of May 23, 1938.** Thereupon counsel for respondents were directed by the court and undertook to draft an injunction order **"to that effect"** (Trans. 6696, pp. 64, 66, 67). The result was the order of injunction entered May 26, 1938 (R. 52; Trans. 7497, pp. 10-11; Trans. 6696, p. 17),—**the head and front of all subsequent litigation between the parties hereto.**

Your petitioner, due presumably to his then counsel's oversight, never did appeal from the order of May 23, 1938, denying him leave to file his proposed second amended petition; and time for such appeal expired at midnight June 22nd, 1938.

June 23, 1938, notice the preceding day, the court denied your petitioner leave to write shareholders (R. 36, first two lines) that (Trans. 6696, p. 33) the stockholders had not heard from petitioner since his letter of April 27, 1938, because the District Court had enjoined petitioner from communicating with other shareholders; that petitioner intended to appeal to the Circuit Court of Appeals and that until the matter was decided by that court petitioner would not be in a position to communicate with stockholders, but that petitioner was not dropping the matter.

February 14, 1939 (R. 36), petitioner petitioned the District Court to vacate or otherwise hold for nought the injunction of May 26, 1938, on the ground that it had expired at midnight June 22, 1938 (Trans. 7497, p.

11). **No evidence was offered,** but the petition was denied March 20, 1939, on the face of the record (R. 37), and leave to appeal denied by the Circuit Court of Appeals April 27, 1939. *In re 4145 Broadway Hotel Co.,* 130 Fed. 2nd, 487.

Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1939, whether to continue or discontinue the trust, your petitioner voted under his powers of attorney to discontinue the trust.—May 22, 1940, upon vote of stockholders required by the Trust Agreement (Article 3, Trans. 7497, pages 143, last three lines,-144, first 25 lines) whether to place a $110,000.00 mortgage on the Hotel Company's real estate, your petitioner voted under his powers of attorney against the placing of such mortgage.—June 15, 1940, pursuant to provision therefor in the Trust Agreement (Art. 6, Sec. 4, Trans. 7497, p. 145), by instrument in writing signed by your petitioner under his powers of attorney your petitioner in terms removed all of respondents as trustees.

By decretal order of August 6, 1940 (Trans. 7497, pp. 159-163; aff'd., *In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd, 639), the District Court held that the trust had not been terminated in the May 1, 1939, referendum, that the placing of the $110,000.00 mortgage had not been effectively dissented to in 1940 and that the trustees were not removed in 1940, **all on the ground that these acts of your petitioner in 1939 and 1940 to those ends were in violation of the injunction of May 26, 1938, and void.**

Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1941, whether the trust should be continued or discontinued, your petitioner participated by writing stockholders letters of March 15, 1941

(Trans. 7763, pp. 27-31), and April 5, 1941 (Trans. 7763, pp. 59-64), and by participating and aiding one Rose Mary King in sending out to stockholders over her name a circular letter of March 17, 1941 (Trans. 7763, p. 25).

These two letters of your petitioner dated March 15 and April 5, 1941, and his participation in the sending out of the Rose Mary King letter of March 17, 1941, are the acts of your petitioner for which he is now committed to the County Jail for ninety days **on the ground that these acts of petitioner in 1941 were in violation of the injunction of May 26, 1938** (Circuit Court of Appeals Opinion, R. 69, lines 2-12).

Basis of Contention of Jurisdiction to Review.

The judgment of the Circuit Court of Appeals review of which is sought are identical orders (R. 72-73) in CCA cases Nos. 7888 and 7891, consolidated, entered July 18, 1942, rehearing denied December 4, 1942 (R. 105). This Court has jurisdiction to grant petitioner the writ of *certiorari* under and pursuant to section 347 (a), Title 28, United States Code, with the same power and authority, and with like effect, as if the cause had been brought to this Court by unrestricted writ of error or appeal.

The Questions Presented.

(1) Was the injunctional order of May 26, 1938, a consent order (as held in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7) or, contrariwise, was the nominal consent of petitioner extorted by coercive threat by the District Court otherwise to attach petitioner for fanciful contempt in sending out petitioner's letter of April 27, 1938?

(2) Whether was or was not your petitioner coerced by the District Court in May, 1938, was the order of May 26, 1938, **as now construed by the District Court and the Circuit Court of Appeals** the order of injunction to which your petitioner consented?

(3) Is the nature, purpose and life of the injunction of May 26, 1938, to be determined from the whole record (as it was determined in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7), or from the bare face of the injunctional order itself (as it was determined in *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, Cert. den'd. 313 U. S. 593, and stated, by necessary implication, or assumed to be determinable in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487)?

(4) It appearing from the whole record that the injunction of May 26, 1938, was to preserve the *status quo* of the proceedings by petitioner for leave to intervene and enjoined petitioner only pending appeal or legal possibility of appeal by petitioner from the order of May 23, 1938 (as held in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7), your petitioner never having so appealed and legal possibility of such appeal having passed by operation of law at midnight, June 22, 1938, did the injunction at that hour expire or cease to operate as a restraint upon your petitioner, whether by operation of law or by the very terms of the order of injunction read in the light of the whole record? Or did that injunction remain in full force and effect, in the so-called discretion of the trial court, until expiration of the ten-year reorganization Trust Agreement or, or and, until the trial court got around to entering final decree in the case of *In re 4145 Broadway Hotel Company,* Debtor, instituted August 10, 1934, plan of reorganization confirmed March 7, 1935, and plan consummated at least by July 29, 1935?

(5) It appearing from the whole record that the injunction of May 26, 1938, was to preserve the *status quo* not of the bankruptcy proceedings proper but of the proceedings instituted by petitioner's motions for leave to file his proposed 2nd amended petition, and enjoined petitioner only pending actual appeal or legal possibility of appeal by petitioner from the order of May 23, 1938, was an order of the District Court necessary to bring the injunction to nought when no such appeal had ever been taken and legal possibility of such appeal had passed by operation of law at midnight June 22, 1938? If so, was it error for the District Court to deny (R. 37) the petitioner's petition of February 14, 1939 (R. 36), to vacate or hold the injunction for nought; or (as stated or assumed in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487) did it lie with the District Court in its so-called discretion, although its purpose **when entered** had been fully effected, to refuse to vacate or hold the injunction for nought?

(6) If the injunction of May 26, 1938, is construed as enjoining petitioner, subject only to the further order of the court, either (a) until entry of final decree in the bankruptcy proceeding proper or (b) until the termination of the reorganization trust, or until the demise without a legal successor of the reorganized debtor corporation, did the District Court err in entering or have jurisdiction to enter that injunction?

(7) Did the District Court err in decreeing or having jurisdiction to decree in its decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) that on August 6, 1940, the injunction order of May 26, 1938, had continued ever since May 26, 1938, and on August 6, 1940, remained in full force and effect?

(8) Did the District Court have jurisdiction to entertain respondents' petition of June 17, 1940 (Trans. 7497, p. 17), under either the provisions of the Trust Agreement of May 1, 1935 or under the attempted reservations of jurisdiction in the order confirming the plan of reorganization, or otherwise?

(9) Did the District Court err in decreeing or have jurisdiction to decree in its decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) that the proposed $110,000.00 mortgage had not been effectively dissented to, that the trust had not been terminated and that respondents had not been removed as trustees?

(10) Did the District Court have jurisdiction to entertain respondents' petition of April 18, 1941 (Trans. 7763, pp. 6-46), praying (Trans. 7763, pp. 16-17) that your petitioner be punished for contempt and, further, be permanently restrained from prosecuting petitioner's libel action in the State court?

(11) Did the District Court err in entering or have jurisdiction to enter its order of December 1, 1941 (R. 46)?

Reasons Relied on for Allowance of the Writ.

(1) The District Court's attachment of petitioner for contempt and the affirmance thereof by the Circuit Court of Appeals is denial to petitioner and violation of petitioner's guaranteed civil rights (R. 44, pars. numbered 14, 16, 17 and 18; Trans. 7497, pp. 63-64; Trans. 6696, p. 94; see also CCA Brief for Appellant herein, p. 8, last 6 lines, and pp. 3, last line—4, 1st line) to preserve which to all of us demands their preservation to each of us,—only the more so during possibly distracting global war for the rights and liberties of all men.

(2) The involved matters and things are of momentous public concern:

(a) Tho not parties hereto, the guaranteed civil rights of at least thirteen hundred individual stockholders, residents of 38 States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal are immediately involved.

(b) The history of this long drawn-out litigation is story of the use and abuse of processes of the federal courts and prostitution of the Bankruptcy Act to the ends of the vicious nation-wide House of Issue, Defaulted Bondholders' Committee racket (Securities and Exchange Commission Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library).

(c) The proper construction of the Bankruptcy Act is of course of first importance to the general public, and insofar as the questions raised touching the Bankruptcy Act are procedural, they are of only the wider public interest because apt more commonly to arise.

(3) In the instant case by implication (Opinion, R. 68-71) and in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, expressly, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, in *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, the same court holds, and in *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the

same matter and between the same parties is within the letter and spirit of Rule 38, 5 (b).

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision.

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. *Case et al.*, v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 109.

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction after confirmation of the plan of reorganization. The interpretation in these respects of the federal statute presents important questions of federal law which have not been, but should be, settled by this Honorable Court.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ or writs of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, full and complete transcript or transcripts of the record and all proceedings of that court herein, which were cases numbered and entitled in that court on its docket cases numbered 7888 and 7891 (consolidated for hearing), *In the Matter of 4145 Broadway Hotel Company, Debtor,* in case number 7888 *F. Gerald Thomas, appellant,* vs. *The United States of America, appellee,* in case number 7891, *F. Gerald Thomas, appellant,* vs. *George W. Rossetter, Jay C. McCord and Maurice A. Rosenthal, appellees;* that said judgments of that court (identical in said cases numbered 7888 and 7891) entered July 18, 1942, rehearings denied December 4, 1942 (R. 105), may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.